



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BY FACSIMILE AND U.S. MAIL

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Suite 1100
Washington, DC 20005

MAR 06 2007

RE: MUR 5712
Senator John S. McCain

Dear Mr. Potter:

On March 14, 2006, the Federal Election Commission (the "Commission") notified your client, Senator John S. McCain, of a complaint alleging that he violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your clients with a copy of the complaint.

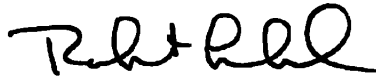
After reviewing the allegations contained in the complaint, your client's response and supplemental response, and publicly available information, the Commission, on February 21, 2007, found reason to believe that Senator McCain violated 2 U.S.C. § 441i(e), a provision of the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

Sincerely,



Robert D. Lenhard
Chairman

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

Respondent: Senator John McCain

MUR: 5712

I. BACKGROUND

This matter arises from a complaint filed by Art Torres concerning a fundraising solicitation sent in connection with an event co-hosted by Californians for Schwarzenegger 2006, Governor Arnold Schwarzenegger's gubernatorial re-election committee, and the California Republican Party, a State party committee. The face of the solicitation features photographs of Senator McCain and Governor Schwarzenegger and the words "SPRING INTO ACTION" "with Governor Arnold Schwarzenegger and Special Guest Senator John McCain." The same words (absent the Governor's first name) also appear on the top of the second page, under which are boxes for donors to check donation amounts ranging from \$1,000 (for an individual ticket) to \$100,000 (for two seats at the head table with the Governor, a table of ten with premiere seating, tickets to the host committee reception, and photos with the Governor). At the bottom of this page, as well as on the third and final page of the solicitation, is a boxed disclaimer stating:

We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond [the] federal limit, and is not soliciting funds from corporations or labor unions.

The complainant alleged that Senator McCain violated the "soft money" prohibitions enacted in the Bipartisan Campaign Reform Act ("BCRA"), specifically, 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, which prohibit Federal candidates and officeholders from, among other things, soliciting funds in connection with any non-Federal election unless the funds are in

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1 amounts that do not exceed the Act's contribution limits and do not come from prohibited
2 sources. In response to the complaint and a follow-up request for additional information, counsel
3 for McCain stated that a representative of Senator McCain had reviewed a draft of the invitation.

4 Because a disclaimer is inadequate where, as here, a Federal officeholder agrees to be
5 featured on publicity or other written solicitations asking for funds in excess of the Act's
6 contribution limits or from prohibited sources, the Commission finds reason to believe that
7 Senator McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

8 **II. DISCUSSION**

9 Under BCRA, Federal officeholders and candidates for Federal office may not solicit,
10 receive, direct, transfer or spend funds in connection with either Federal or nonfederal elections,
11 unless the funds comply with Federal contribution limits, source restrictions, and reporting
12 requirements. 2 U.S.C. §§ 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61 and 300.62. Specifically,
13 a Federal officeholder or candidate, whether in connection with a Federal or non-Federal
14 election, may not raise funds from individuals that exceed the current limit of \$2,300 per election
15 per candidate,¹ and may not raise funds from corporations or labor organizations.² At all times
16 relevant to this matter, the Commission defined the term "solicit" to mean "to ask that another

¹ At the time of the alleged violation, the individual contribution limit was \$2,100.

² A Federal officeholder or candidate for Federal office may, however, attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, without restriction or regulation. 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64. In the Explanation and Justification for 11 C.F.R. § 300.64, the Commission noted that the rule "is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. § 441i(e)(1)." 70 Fed. Reg. 37,649 37653 (June 30, 2005).

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1 person make a contribution, donation, transfer of funds, or otherwise provide anything of value
2 whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided
3 directly, or through a conduit or intermediary." 11 C.F.R. § 300.2(m).³

4 The Commission has interpreted this prohibition in the context of particular facts
5 presented in several Advisory Opinions regarding Federal candidates' and officeholders'
6 participation in fundraising events where donations outside of Federal contribution limits and
7 source restrictions were sought. See AO 2003-03 (*Cantor*), AO 2003-36 (*Republican Governors*
8 *Association* ("RGA")); see also AO 2003-37 (*Americans for a Better Country* ("ABC"))
9 (superseded by 11 C.F.R. § 106.6 on Nov. 23, 2004).⁴

10 The facts addressed in the *Cantor* Opinion relate to the appearance of Federal candidates
11 and officeholders in publicity preceding an event at which funds would be raised for state
12 candidates. Specifically, the requestors noted that:

13 they would like Representative Cantor to: (1) attend campaign events, including
14 fundraisers, (2) solicit financial support, and (3) do so orally or in writing.
15 Congressman Cantor would like to participate in their campaigns in this manner.
16 Requestors ask for guidance from the Commission about the degree to which
17 Representative Cantor, as a Federal officeholder and candidate, may engage in
18 State and local election activities.
19

³ On March 13, 2006, seven days after the complaint in this matter was filed, the Commission revised the definition of "solicit" with an effective date of April 19, 2006. See 71 Fed. Reg. 13,926 (Mar. 20, 2006). This rulemaking was in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005). The Commission's conclusions in this matter would be unaffected even if the new rules had applied. Additionally, in adopting a revised definition of "solicit," the Commission specifically declined to make changes to the principles set forth in the Advisory Opinions that are applicable here or to initiate a rulemaking to address the issues based on testimony that the principles articulated in these Advisory Opinions are well-understood and that "the community is complying with them." See 71 Fed. Reg. 13,926, 13,930-31.

⁴ Counsel for Senator McCain properly notes, in response to the complaint in this matter, that Senator McCain is "in the same position as the requestors" in *Cantor* and RGA and therefore may rely on the Advisory Opinions without being subject to sanction. See 2 U.S.C. § 437f (c).

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1 In response to the specific question asking whether the Congressman's attendance at the event

2 may be publicized and whether he may participate in the event as a featured guest, the

3 Commission responded:

4 Section 441i(e)(1) and section 300.62 do not apply to publicity for an
5 event where that publicity does not constitute a solicitation or direction of non-
6 Federal funds by a covered person, nor to a Federal candidate or officeholder
7 merely because he or she is a featured guest at a non-Federal fundraiser.

8 In the case of publicity, the analysis is two-fold: First, whether the
9 publicity for the event constitutes a solicitation for donations in amounts
10 exceeding the Act's limitations or from sources prohibited from contributing
11 under the Act; and second, whether the covered person approved, authorized, or
12 agreed or consented to be featured or named in, the publicity. If the covered
13 person has approved, authorized, or agreed or consented to the use of his or her
14 name or likeness in publicity, and that publicity contains a solicitation for
15 donations, there must be an express statement in that publicity to limit the
16 solicitation to funds that comply with the amount limitations and source
17 prohibitions of the Act.

18 AO 2003-03 (Response to Question 3.c) (citations omitted).

19 The Commission revisited the issue of covered persons' participation as featured guests

20 in RGA. The specific question there was:

21 1.b. May a covered individual participate [as a featured guest at an RGA
22 fundraising event] by having his name appear on written solicitations for an RGA
23 fundraising event as the featured guest or speaker?

24 After restating the two-step analysis from the *Cantor* Advisory Opinion, the Commission

25 answered:

26 A Federal candidate may not solicit funds in excess of the amount limitation or in
27 violation of the source prohibitions of the Act. If the covered individual approves,
28 authorizes, or agrees or consents to be named or featured in a solicitation, the
29 solicitation must contain a clear and conspicuous express statement that it is
30 limited to funds that comply with the amount limits and source prohibitions of the
31 Act.
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33 AO 2003-36 (Response to Question 1.b).

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1 Thus, if a Federal officeholder or candidate approves, authorizes, or agrees or consents to
2 be named or featured in a solicitation, then the entire solicitation must be limited to Federally
3 permissible funds. The Commission further explained this restriction in *RGA*, stating that a
4 disclaimer will not inoculate a covered person who approves his or her appearance in a
5 solicitation that explicitly seeks funds beyond the limits and prohibitions of the Act.
6 Specifically, the Commission explained that a disclaimer is inadequate where, as here, the
7 publicity or other written solicitation asks for funds in excess of the Act's contribution limits or
8 from prohibited sources:

9 Although Advisory Opinion 2003-03 [*Cantor*] might be read to mean that a
10 disclaimer is required in publicity or other written solicitations that explicitly ask
11 for donations 'in amounts exceeding the Act's limitations and from sources
12 prohibited from contributing under the Act,' that was not the Commission's
13 meaning. The Commission wishes to make clear that the covered individual may
14 not approve, authorize, agree, or consent to appear in publicity that would
15 constitute a solicitation by the covered person of funds that are in excess of the
16 limits or prohibitions of the Act, regardless of the appearance of such a
17 disclaimer.

18
19 AO 2003-36, at n.9.

20 Subsequently, the Commission again considered the involvement of Federal officeholders
21 or candidates in fundraising for non-Federal elections in the *ABC* Advisory Opinion. In *ABC*,
22 which primarily addressed the allocation of expenses by nonconnected committees and was
23 superseded when the Commission enacted new regulations regarding the allocation of certain
24 expenses (*see* 69 Fed. Reg. 68056 (Nov. 23, 2004), at 68063), the requestor asked if Federal
25 officeholders or candidates could be named as "honored guests" or "featured speakers" at
26 fundraising events for ABC's non-Federal account. The Commission, citing to both the *Cantor*
27 and *RGA* Advisory Opinions, stated:

[A] candidate's consent or agreement to be mentioned in an invitation as an honored guest, featured speaker or host, where that invitation is a solicitation, constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents to be named in a fundraising solicitation as an honored guest, featured speaker or host, or if the invitation constitutes a solicitation for any other reason, then the solicitation must contain a clear and conspicuous statement that the *entire* solicitation is limited to funds that comply with the amount limits and source prohibitions of the Act.

AO 2003-37, at 18 (emphasis added).

In sum, to comply with the soft money prohibitions of BCRA, Federal officeholders and candidates must adhere to the following requirements if and when they approve, authorize, agree or consent to appear in a written solicitation in connection with the election of state candidates:

1. A Federal officeholder or candidate may appear in written solicitations in connection with the election of state candidates, so long as the solicitation is expressly and entirely limited to amounts and from sources that comply with the Act's contribution limits and source prohibitions.
2. If a written solicitation in connection with the election of state candidates asks for donations, but does not specify an amount, a Federal officeholder or candidate may appear in the written solicitation provided it contains express language stating that the Federal officeholder or candidate is only soliciting amounts that comply with the Act's contribution limits and source prohibitions.
3. However, if a written solicitation in connection with the election of state candidates explicitly asks for donations of funds in amounts exceeding the Act's contribution limits or from prohibited sources, then a Federal officeholder or candidate may not appear in the solicitation regardless of whether there is an

1 express statement limiting the Federal officeholder or candidate's solicitation to
2 funds that comply with the amount limits and source prohibitions of the Act.⁵

3 The solicitation at issue in this matter sought donations from "individuals, businesses,
4 corporations and general PACs" in specific amounts of \$1,000 (Individual Ticket), \$10,000
5 (Bronze Sponsor), \$25,000 (Silver Sponsor), \$50,000 (Gold Sponsor), and \$100,000 (Platinum
6 Sponsor). With the exception of the \$1,000 box, the amounts requested exceed the Federal
7 contribution limits for individuals per election, and the solicitation targets corporations, which
8 are prohibited from making contributions under the Act. *See* 2 U.S.C. §§ 441a and 441b.

9 It therefore would run afoul of BCRA's prohibitions on soliciting non-Federal funds for
10 Senator McCain's name or likeness to appear in this invitation as a featured guest or speaker
11 since he approved, authorized, agreed, or consented to be featured, or named in, the invitation.
12 *See supra*, p. 2. Moreover, the disclaimers in the solicitation, noting that "the solicitation for
13 funds is being made only by Californians for Schwarzenegger and the California Republican
14 Party" and that "[i]n accordance with Federal law, Senator McCain is not soliciting individual
15 funds beyond Federal limit, and is not soliciting funds from corporations or labor unions," do not
16 suffice to divorce the Senator from the solicitation. *See supra*, pp. 3-7.

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⁵ An exception to this bar exists for situations where a Federal officeholder or candidate is "merely mentioned" in the text of a solicitation. Such "mere mention" would not, in and of itself, constitute a solicitation of non-Federal funds by the Federal officeholder or candidate. *See* AO 2003-36, at 6. At the open meeting at which the Commission discussed RGA, Commissioners stressed that this was a narrow exception that would cover, for example, instances where a state candidate sought and received permission from a U.S. Senator to refer in a solicitation to the fact that he or she worked as a staff member to the Senator. *See* Audio Tape Discussion of AO 2003-36 (Jan. 7, 2004). In any event, the prominent references to Senator McCain as "Special Guest" and "Speaker" for this event go well beyond "mere mention," and an officeholder's appearance in such capacities is specifically addressed in AO 2003-36.

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III. CONCLUSION

Based on the above, the Commission finds reason to believe that Senator John S. McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

The Commission also finds no reason to believe that Senator McCain violated 2 U.S.C. § 441a(a) and 11 C.F.R. § 300.61 because the complaint does not contain any factual support for the allegation that he personally made any contributions in excess of the limits set forth in 2 U.S.C. § 441a(a) nor solicited, received, directed, transferred, spent, or disbursed funds in connection with an election for Federal office, including funds for any Federal Election Activity, as prohibited under 11 C.F.R. § 300.61.

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